

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Holly McCann
Chief, Excise Tax Program
(Small Business/Self-Employed)

from: Stephanie Bland
Senior Technician Reviewer, Branch 7
(Passthroughs & Special Industries)

subject: Separately Stated Fees in Nontaxable Communication Services

This memorandum reconsiders one of the conclusions reached in a previous Chief Counsel Advice, CCA201123028, issued on March 4, 2011. This advice may not be used or cited as precedent.

ISSUES

Whether separately stated fees used in connection with providing only nontaxable communications services, such as bundled wireless service and long distance only service, are taxable?

CONCLUSIONS

Separately stated fees used in connection with providing only nontaxable communications services are not taxable.

BACKGROUND AND FACTS

In CCA201123028, you identified a number of fees and charges (collectively “fees”) that are associated with providing communications services. We analyzed each fee individually and determined whether a particular fee was subject to the excise tax imposed on communications services. Specifically we considered municipal charges/ public right-of-way user fees, extended area service fees, administrative charges,

regulatory programs charges and interstate primary carrier fees. We concluded that all the fees were includible except the municipal charge/public right-of-way user fee.

You then asked us whether it made a difference whether the underlying service was for nontaxable service. We took the position that if a fee was separately stated, it was not part of the nontaxable service and must be considered separately as was done in Notice 2007-11, 2007-1 C.B. 405, with the Subscriber Line Charge (SLC). According to the information we had, it appeared that the fees could be used in connection with providing local-only service even if the underlying service was nontaxable. Therefore, we concluded the fees were includible in the tax base. It is this conclusion that we now reconsider.

Subsequent to issuing CCA201123028, we received comments from providers of nontaxable communication services, including bundled wireless providers and long distance only providers. Those providers described the fees in more detail and explained how such fees fit into their billing structure. They also demonstrated how these fees were not similar to the SLC and could not be used to provide services that are in connection with local-only service. Because the facts are different than those originally considered in CCA201123028, we must reconsider your question of whether the taxability of the underlying service impacts whether a particular fee is includible in the tax base in light of the revised facts.

LAW AND ANALYSIS

Section 4251(a) imposes a tax on amounts paid for communications services, defined in § 4251(b)(1) as local telephone service, toll telephone service, and teletypewriter exchange service. Section 4251(a)(2) provides that the tax is paid by the Customer.

Section 4291 provides that the tax is collected by the Provider.

In Notice 2006-50, 2006-1 C.B. 1141, the Internal Revenue Service (IRS) determined that Customers are only required to pay the § 4251 tax for “local-only” service. As relevant herein, § 4252(a) provides that local telephone service means (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone stations constituting a part of such local telephone system, and (2) any facility or service provided in connection with a service described in (1) above.

To be an amount paid for communications service, a Fee must be paid for a taxable service. Generally speaking, the IRS considers amounts paid for local-only service to be subject to the § 4251 tax. Section 4(a) of Notice 2006-50 provides that taxpayers are no longer required to pay the § 4251 tax for nontaxable service. Section 3(d) of Notice 2006-50 defines the term “nontaxable service” as long distance and bundled service; that is, not local-only service. Section 4(b) of the Notice directs that the § 4251 tax is imposed on amounts paid for “local-only” service.

Section 3(b) of Notice 2006-50 defines local-only service as:

[L]ocal telephone service, as defined in § 4252(a), provided under a plan that does not include long distance telephone service or that separately states the charge for local service on its bill to customers. The term also includes services and facilities provided in connection with service described in the preceding sentence even though these services and facilities may also be used with long distance service. See, for example, Rev. Rul. 72-537, 1972-2 C.B. 574 (telephone amplifier); Rev. Rul. 73-171, 1973-1 C.B. 445 (automatic call distributing equipment); and Rev. Rul. 73-269, 1973-1 C.B. 444 (special telephone).

As a result, if a Fee is characterized as local telephone service or provides a service in connection with local-only service -- even if also used with nontaxable long distance service -- it is subject to tax.

Section 8(b) of Notice 2007-11, 2007-1 C.B. 405, provides that the SLC, sometimes called the "Federal Access Charge," the "Customer or Subscriber Line Charge," or the "Interstate Access Charge," is an amount paid for local telephone service, and thus taxable. The Notice relies on Rev. Rul. 87-108, 1987-2 C.B. 260, which states that the SLC is a flat-rate, monthly charge authorized by the FCC and charged by local telephone companies for access to their local exchange facilities for interstate use by long-distance carriers and Customers. Because the SLC itself does not give Customers the right to make long distance calls, Rev. Rul. 87-108 reasons that the SLC is an amount paid in connection with local telephone service. Thus, the Notice holds that the SLC is subject to the § 4251(a) tax as an amount paid for local telephone service.

In contrast, section 8(c)(2) of Notice 2007-11 provides that the USF, sometimes called the "Federal Universal Service Fee" or the "Universal Connectivity Fee," is not an amount paid for local-only service, and thus is not taxable. The USF is a mandatory contribution made to the FCC by Providers that provide interstate and international telecommunications service to support various federal programs. The Notice reasons that the USF is charged to Customers in connection with long distance service because it is paid by Providers that offer long distance service.

The tax treatment of fees depends on whether the fee is made in connection with local-only service. As the facts state, the fees charged by providers of nontaxable communications services, such as bundled wireless providers and long distance only providers, are not used in connection with providing local-only service. Since fees would only be includible if they are used in connection with providing local-only service, the fees in question are not includible in the tax base. Therefore, providers of nontaxable services are not required to collect and pay over tax on such fees. We withdraw the advice set forth in CCA201123028 to the extent it is inconsistent with this advice.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Charles J. Langley, Jr. at (202) 622-3130 if you have any further questions.